No. 05-

IN THE

Supreme Court of the United States

CAMERINO M. LOPEZ, JR.,

Petitioner,

v.

MARY K. CARR, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a public school principal's termination from his employment by his superintendent was upheld on appeal by his school district based on the school board's written "Findings [of Fact], Conclusions [of Law] and Order", did he received the process due to him just because he was accorded a full school board hearing, was represented by counsel and allowed to call witnesses and cross-examine the school district's witnesses, or could a reasonable jury decide that he had been deprived of a fair school board hearing, and hence deprived of due process, where there was substantial evidence at trial that: (1) allegations of misconduct on the part of the principal *other* than those about which he received notice were determinative in the board's decision to terminate the him – thus depriving him of the opportunity to prepare a defense to those allegations; (2) the board failed to advise the principal of additional prejudicial information that they had received about the principal prior to the hearing.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

In the court of appeals the following parties appear
appellees:

Mary K. Carr

Jesus Escarcega

Bill H. Scheel

Patricia A. Williams

Kristyne Hannah [Hannah-Strike]

Debra Gomez

James Streetz

Lois Luckey

Valerie Robles

Amy Teilborg

Paula Killian

Rebekah Cooper

Marilyn Sanchez [Sanc[illegible]z-Ayala]

Jesse Armatage

Daniel Ortega

Mary Tovar

Garthanne DeOcampo

Patricia DeBermuda

Dora Mesa

Phoenix Elementary School District No. 1

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OPINIONS BELOW

The district court's opinion (per Broomfield, D.J.), granting defendants' Rule 50 motions for judgment as a matter of law after close of evidence at the end of almost six weeks of jury trial, (Appendix ("Pet. App.") 3a-40a), is an unpublished opinion. The court of appeals' opinion (per Wallace, Trott & Rymer, JJ) affirming the district court (Pet. App. 1a-2a) is also unpublished, but is accessible at 154 Fed. Appx. 12 (2005).

STATEMENT OF JURISDICTION

The court of appeals entered its memorandum opinion and order on November 9, 2005. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983.

Civil action for deprivation of rights

Section § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Ariz. Rev. Stat. § 15-539.[1]

A. Upon a written statement of charges presented by the superintendent, charging that there exists cause for the suspension without pay for a period of time greater than ten school days or dismissal of a certified teacher of the district, the governing board shall, except as otherwise provided in this article, give notice to the teacher of its intention to suspend him without pay or dismiss him at the expiration of thirty days from the date of the service of the notice.

. . .

E. Any written statement of charges alleging professional conduct, conduct in violation of the rules, regulations or policies of the governing board or inadequacy of classroom performance shall specific instances of behavior and the acts or omissions constituting the charge so that the certified teacher will be able to prepare a defense.

1. The Arizona statute is cited as it was in 1994, the relevant time. The statute has since been amended.

> It shall, if applicable, state the statutes, rules or written objectives of the governing board which the certificated teacher is alleged to have violated and set forth the facts relevant to each occasion of alleged unprofessional conduct, conduct in violation of the rules, regulations or policies of the governing board or inadequacy of classroom performance.
>
> . . .
>
> G. The certificated teacher who receives notice that there exists cause for dismissal or suspension without pay shall have the right to a hearing if he files a written request with the governing board within thirty days of service of the notice . The filing of a timely request shall suspend the imposition of a suspension without pay or a dismissal pending completion of the hearing.

STATEMENT OF THE CASE

Petitioner Camerino Lopez used to be an elementary school principal in Phoenix, Arizona. And not just any elementary school principal – his school, and he, won local and national honors, including a mention in the Congressional record, for their exemplary work with at-risk inner-city children. In 1994 that all changed when Lopez, following a well orchestrated effort of some of his own staff and school district personnel, was ousted from his position and humiliatingly terminated among public accusations that would ensure he would not work again.

Lopez asserts in this case that the school district, and various individuals connected to the district, including its superintendent, its human resources director, its board members, his assistant principal and members of his staff, deprived him of his property interest in his position with the district and of his liberty interest in his reputation and good name, without due process. Lopez also raised some related state common law claims that are not at issue in this petition.

The focus of Lopez' claims is the public evidentiary school board hearing provided to him at the conclusion of which the board voted (4-0, one member having recused himself in the middle of the hearing) to uphold the superintendent's decision to fire him. The hearing took place from September to November 1994, over

After over six years of pre-trial proceedings and then almost six weeks of trial before a jury in the District of Arizona, the trial judge granted enough of the numerous Rule 50(a) defense motions so that judgment was entered against Lopez. Key to the decision was the trial judge's ruling that Lopez had received "more than the process he was due" at his board hearing in 1994. Pet. App. 38a. The trial judge failed to address Lopez arguments concerning the unfairness of his hearing because of lack of adequate notice of all the charges against him and the impact that those additional charges had on the board members that voted to uphold his termination.

On appeal to the Ninth Circuit court of appeals, the trial judge's due process ruling was summarily upheld. The court of appeals also focused on the facts of a lengthy board hearing with Lopez represented by counsel with the ability to call witnesses and to cross-examine. Lopez' arguments

concerning the evidence of unfairness were again cursorily dismissed as "allegations of bias and error in the proceedings" – the evidence of lack of fundamental fairness, including lack of adequate notice of all of the allegations against him, received no comment.

1. Camerino Lopez worked as a principal in the Phoenix Elementary School District No. 1 for 12 years – from 1982 until 1994 – with the exception of about five months when he had a temporary reassignment always as the principal at Garfield Elementary School in November 1994 he was terminated by the district. During those years Lopez consistently received excellent evaluations – until 1994. The District stipulated at trial that Lopez had faithfully performed over and above his duties to the District and that he had received local and national commendations and awards for himself, for Garfield Elementary School and for the District. Under Lopez' principalship Garfield Elementary School, situated in the Phoenix inner city in a predominately Spanish-speaking neighborhood, was selected by the United States Department of Education as one of its "Schools that Work" and its selection was recognized in the Congressional record.

But Lopez' record of professional success came to a grinding halt in 1994. On March 10, 1994, 13 of Lopez' staff of 73 published a "Public Complaint" against Lopez, openly campaigning for his ouster as principal. On March 28, 1994, five Garfield teachers (four current, all part of the "Public Complaint" group, and one a former teacher) went to the district's Human Resource department and together filed sexual harassment charges against Lopez. A sixth former staff member also complained about Lopez after the Arizona newspaper printed a story about the first five sexual harassment complaints and the newspaper reporter contacted

her. The Superintendent's "Statement of Charges" was based solely on these six sexual harassment complaints.

There had already been significant newspaper coverage of the "Public Complaint" and of the sexual harassment charges. In addition, at the school board meeting on July 12, 1994, the Superintendent's attorney had read out to the public, in English and Spanish, the lurid details of the six sexual harassment complaints, adding his own commentary, and including a statement that Lopez (who was not at the meeting), although he had responded to the women's allegations "had not done so in detail." Moreover the Superintendent sternly warned Lopez against his talking to the press. Under these circumstances Lopez asked that his termination appeal hearing before the board be in public, so that his side of the story could be promulgated also.

The Board hearing began, in public as Lopez had requested, on September 2, 1994, and continued over eleven separate days, ending on November 10, 1994. Not all the hearings were public. Several closed sessions took place that related to district personnel other than the six complainants and their interactions with Lopez, and also to Lopez' 1994 supplemental evaluation (based on the Superintendent's own reaction to the "Public Complaint").

On November 17, 1994, there was a very short session at which the Board, without any deliberation or discussion, adopted a document entitled "Findings, Conclusions and Order" which confirmed the Superintendent's decision to fire Lopez. The factual findings recited therein were not made, and the conclusions were not drawn, by the Board members themselves; rather, the "Findings, Conclusions and Order" were created by the attorney advising the Board through trial, an appointed attorney from the county attorney's office.

Lopez has never disputed that he had a lengthy hearing before the school board, that he had an attorney to represent him throughout, and that he was able to call his own witnesses and to cross-examine the witness called by the school administration. But a lengthy hearing with an attorney does not guarantee due process – and it did not in this case. The board member who moves to adopt the "Findings, Conclusions & Order", Mary Carr, admitted at trial that she based "*a lot* of [her] decision . . . upon evidence [in the closed sessions]". This was an important concession from which the jury, had it been given the opportunity to do so, could easily have drawn the inference, indeed would have been almost *forced* to draw the inference, that the board decision to terminate Lopez *was not* based on the six allegations of sexual harassment, which were not the topic of any of the closed sessions.

The closed sessions covered the following: (1) issues with the "Public Complaint" about which the Superintendent opined during one closed session that even if Lopez' staff had negative "perceptions" about Lopez' conduct, regardless of whether the conduct had in fact taken place, then Lopez should not continue as principal; (2) actions taken by the district against other employees accused of sexual harassment by the district; (3) *other* allegations purportedly made by women staff members against Lopez, all in the nature of hearsay, some pure innuendo about whether the women had complained about anything that could possible be construed as "sexual" in nature; (4) an outburst from one board member concerning what one woman had told him about Lopez sexually harassing her, which lead to the board member deciding to recuse himself, so that he did not participate in the final vote, but only after it was made clear that he had discussed the things he had been told with at least two of the other (four) board members who did remain and vote.

During the closed session testimony concerning other school personnel accused of sexual harassment, the Board was reminded of a situation during the previous school year which resulted in the Board terminating the then-Superintendent (i.e. the one prior to the Superintendent who provided the Statement of Charges against Lopez and terminated him), for among other things, allegedly failing to investigate charges of sexual harassment against two principals. This discussion was particularly damaging to Lopez. His name was not specifically mentioned as one of the two principals, although the charges against the second principal were discussed. The discussion at the closed session made it clear that the Board remembered the situation with the former Superintendent. But Lopez (and his attorney) did not know what was being referred to, and even when Lopez's attorney said that he did not know what everyone was referring to, the board members still did not tell him.

Lopez had no idea until *during this litigation*, years after the hearing, that the board had gone though the hearing believing that there had been earlier sexual harassment charges against Lopez and that the prior Supervisor had failed to properly investigate them, nor that the prior Supervisor had been terminated in part for supposedly failing to investigate earlier charges against him. During the trial the district could produce no record of any sexual harassment charges against Lopez prior to the six in 1994, no records of any counseling or warning given to Lopez, and no copy of the "compliance log" that the Human Resource director testified she supposedly kept to log in all complains that were made to the district.

Lopez did not know during the hearing, or for many years afterwards, that the board members thought they knew that

there had been earlier unresolved sexual harassments complaints against Lopez, during the prior school year, and that the prior Superintendent had supposedly put the district at risk by not properly investigating them, essentially letting Lopez get away with it. Lopez also did not know during the hearing what the woman teacher had supposedly told the recused board member.

As well as these "secrets" the board also had a private ["executive"] session in July 1994 with the Superintendent and her attorney (who had been responsible for "investigating" the six sexual harassment charges) during which the board was presented with who knows what information. At trial the school district invoked "executive privilege" concerning this session, even while acknowledging that the session had not been properly noticed in conformity with Arizona' s Open Meeting Statutes, and the trial judge upheld the district so that Lopez still does not know what was told to the board then. Ironically, the Superintendent's attorney, just after this "executive session," which amounted to an *ex parte* meeting with one side to the Lopez dispute, announced in the public meeting that the board members should, from that point on, avoid any *ex parte* communications about the allegations against Lopez since they would be sitting in a judicial capacity at Lopez' appeal hearing.

It appears, then, to be virtually certain that Lopez was terminated based on allegations, rumor and innuendo against which Lopez had no chance to defend himself, in some cases because he did not even know what had been said, and in other cases because he was provided with no notice at that those matters were at issue in his termination. However, Lopez was entitled, as a matter of Arizona statute (Ariz. Rev.

Stat, § 15-539.E) and as a matter of constitutional due process, to have the Board decide what he had done, or not done, with respect to each of the six women, the only charges as to which he had notice, and to have the Board then decide, based solely on the evidence about those charges and the law, whether his conduct indeed constituted sexual harassment. Instead, Board members decided first that they had heard enough to have Lopez fired, then asked the Maricopa County attorney who was assisting them to write up something legally sufficient to support Lopez' firing. The Board either did not deliberate together at all on the evidence, or they did so improperly (that is, illegally), probably in an executive session.

The entire proceeding so shattered Lopez' physical and mental health, and his life, that he alleged in this lawsuit that he is entitled to a tolling of the statutes of limitation because of his "unsound mind" caused by his treatment at the hands of defendants. His reputation was in ruins, in any event. By the time of trial, then nine years after his termination, he had never found another job – doing anything.

2. In May 1997, aided by friends and supporters from the school district, Lopez filed, *pro per,* this lawsuit against the school district and the individuals implicated in his professional undoing, in the United States District Court for the District of Arizona. After an attorney took on representation of Lopez in December 1997, the Complaint was amended in 1998 to included claims of deprivation of property and liberty interests without due process under 42 U.S.C. § 1983, and related state statutory and common law claims.

In November 2003 a jury trial commenced against all defendants on the § 1983 claims and on those Arizona common law claims that remained after the summary judgment rulings. The jury trial proceeded for almost six weeks. At close of evidence Lopez moved to dismiss three defendants, which was granted. Defendants made several motions under Rule 50 for judgment as a matter of law. The district court granted sufficient of the Rule 50 motions for judgment to be entered against Lopez without the case going to the jury for deliberation. The District Court ruled on December 24, 2003.

As to Lopez' claim that he had been denied due process, the district judge ruled as follows:

> Plaintiff was given notice of the charges against him, indeed his lawyer Montoya was present when they were adopted; Plaintiff was given a right to, and did, request a full public hearing before the Board; he was represented by an able attorney, Montoya, both prior to and throughout the proceedings; Montoya vigorously and thoroughly cross-examined all of the witnesses called by Ortega [the administration's attorney]; Montoya made numerous objections to witness's testimony, documentary evidence, items of procedure, etc; Montoya made several motions and arguments on various matters through the course of the entire hearing; and Montoya called some 20 witnesses to testify on plaintiff's behalf. *Plaintiff received more than the process he was due.*

Pet. App. 38a. Emphasis supplied.

Judgment was entered against Lopez and in favor of all defendants on December 29, 2003. No post-judgment Rule 59 or 60 motions were filed.

3. Lopez timely filed his notice of appeal with the United States Court of Appeals for the Ninth Circuit on January 28, 2004. The Ninth Circuit's decision was entered on November 9, 2005. The Ninth Circuit's ruling on the due process issue was as follows:

> Lopez has failed to establish a violation of his constitutional rights. In his eleven day termination hearing, he was represented by counsel, testified at length, presented twenty witnesses, and cross-examined adverse witnesses. The hearing did not violate due process [citations omitted]

Pet. App. 2a. No petition for rehearing or *en banc* consideration was filed.

REASONS FOR GRANTING THE PETITION

When the Court of Appeals for the Ninth Circuit decided against Lopez on his due process claims, it considered only whether he had an "opportunity" to be heard by the school board before it upheld the superintendent's decision to terminate Lopez, and whether the school board had been "biased" during the hearing; but the court of appeals should have considered whether Lopez had a "*meaningful*" opportunity to be heard, which, in particular, required Lopez having *notice* of all the charges against him that the school board would consider in reaching its decision, so that he would have the opportunity to address all of those charges. Instead Loped was blind- sided by new allegations raised in

the middle of the hearing, and others were kept secret from him but were known to the decision makers and could well have influenced them. In ignoring this key aspect of due process the Ninth Circuit decided an important question of federal law in a way that conflicts with relevant decisions of this Court, and also sanctioned the district court making the same error.

I. A UNBROKEN CHAIN OF DECISIONS FROM THIS COURT HAS ESTABLISHED THAT A PUBLIC EMPLOYEE ENTITLED TO A HEARING TO CHALLENGE HIS OR HER TERMINATION FROM PUBLIC EMPLOYMENT, OR TO CLEAR HIS OR HER NAME IN CONNECTION WITH SUCH TERMINATION, IS ENTITLED NOT JUST TO AN "OPPORTUNITY" TO BE HEARD, BUT TO A "*MEANINGFUL*" OPPORTUNITY TO BE HEARD, WHICH INVOLVES RECEIVING NOTICE OF ALL THE CHARGES AND REASONS FOR THE GOVERNMENT ACTION SO THAT THE EMPLOYEE MAY FAIRLY ADDRESS THEM AT THE HEARING

This Court long ago held that "Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense." *Baldwin v. Hale*, 1 Wall. 223, 233 (1864). The "opportunity to make [a] defense" certainly involves at a minimum some place and time for that opportunity to take place – a meeting or a hearing or a trial, as the circumstances demand. But the mere fact that there is a such an event at some time and place does not by itself ensure that there is an "opportunity to make a defense."

Nor does the quantity of paperwork generated and amount of evidence sifted through by the fact-finder determine the fairness of the hearing. Those whose property or liberty may be taken from them have the right to have the reasonable opportunity to know the claims against them. *Morgan v. United States*, 304 U.S. 1, 25 (1938) (holding that a full and fair hearing does not necessarily result from the consideration of thousands of pages of evidence, if the party opposing the government is not "fairly advised" of all the information the government intends to consider).

In 1955, this Court decided *Simmons v. United States*, 348 U.S. 397 (1955), in which the Court held that an armed services registrant denied conscientious objector status was entitled to fair notice of all the adverse charges in the report upon which the Department of Justice relied in reaching its decision, and not just "vague hints" gleaned from the questions of the hearing officer. *Id.* at 401-402. In *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 646 (1985), this Court held that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." More recently, in, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004), the Court reminded the Defense Department that due process includes the right to notice of the full factual basis for the government action, as well as a "fair opportunity to rebut" such factual assertions. Based on these clear precedents from this Court, it is apparent that due process requires not only a suitable time and place to be heard, but also notice of all the allegations the government intends to consider in reaching its decision and an explanation of the government's evidence.

It is this critical component of due process that the court of appeals in this case chose to totally ignore[2], even though Lopez had presented substantial evidence at trial not only that he had *not* received complete notice of all of the allegations against him which were to be considered at the board hearing, but also that those allegations for which he lacked notice may well have been the very allegations that triggered the school board's decision. Since the court of appeals completely ignored relevant decisions of this Court, and sanctioned the district court doing the same, and since this is an important issue that potentially affects any public employee who claims a "due process" hearing, the Court should grant Petitioner's request for a writ of *certiorari* to the Ninth Circuit Court of Appeals.

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2. Other courts of appeal have explicitly recognized the constitutional requirement of full notice in the context of a due process hearing. *See, Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368, 1373 (Fed. Cir. 1999) (deciding official received *ex parte* information about terminated bank examiner thus violating due process); *Otero v. Bridgeport Housing Authority*, 297 F.3d 142, 148-153 (2d Cir. 2002) (terminated city employee not provided with documents or information underlying the evidence the city claimed to have against her, so that judgment as a matter of law should not have been granted on due process issue); *Singfield v. Akron Metropolitan Housing Authority*, 389 F.3d 555, 566 (6th Cir. 2004) (terminated maintenance worker survived summary judgment on due process claim because, although he was notified and given an explanation of the charges giving rise to his suspension, he was not notified or given an explanation of the additional charges giving rise to his termination).

II. LOPEZ PRESENTED SUBSTANTIAL EVIDENCE FROM WHICH A REASONABLE JURY COULD HAVE DECIDED THAT THE SCHOOL DISTRICT FAILED TO GIVE HIM FULL AND FAIR NOTICE OF THE CHARGES AGAINST HIM

When Lopez was first advised of the Superintendent's decision to terminate him, in July 1994, he was provided with a written "Statement of Charges" which did comply with the requirements of Ariz. Rev. Stat. § 15-539.E. The charges specified in detail, however, were only those pertaining to each of the six sexual harassment complaints filed in the Spring and early summer of 1994, those of the five teachers who went together to Human Resources and the later former assistant principal who joined in after talking to the newspaper reporter. There is no dispute that Lopez had notice of these six charges.[3]

At the end of the Lopez appeal hearing before the school board on November 10, 1994, the board retired into executive (closed) session. The board president, Bill Scheel, announced that this was being done "to seek legal counsel" (a legitimate reason for a closed session) and also "[to] begin necessary deliberations" (not a legitimate reason in light of Arizona's Open Meeting statutes and the fact that Lopez had specifically requested a public hearing), whereupon the president closed the hearing to the public and also to Lopez and his attorney. The board did not meet again concerning Lopez until

3. Although whether he had a full and fair opportunity to prepare a defense to them is called into question by the fact only one of the complaints related to the current school year and went back as far as 1986. This already made the preparation of any defense, especially to charges that something was said in private, decidedly difficult already.

November 17, 1994 – for a very short meeting that took up two pages of the court reporter's transcript.

On November 17 board member Mary Carr made a motion at the beginning of the meeting. Her motion was that the board should issue an order upholding the Notice of Dismissal of Lopez and adopt the proposed findings and conclusions ("before us today." This was the first mention there had been of any proposed findings and conclusions. There was no discussion on Mary Carr's motion, and no reading out of the "proposed findings and conclusions." The board members simply voted 4-0 (the one member having recused himself during the hearing) to terminate Lopez.

There was never any deliberation in public by the board, although Lopez had asked for a public hearing. The "Findings, Conclusions and Order" themselves recited that the board "deliberated on the evidence" but if so it was never done in public, and if the board deliberated together in private (at an executive session or otherwise) it would have been contrary to Arizona Open Meeting Statutes.[4] The November 10 meeting transcript, of course, recited that the board had gone into executive session to "deliberate." At trial board members testified that there had be no deliberations in private but that each board member had taken the papers home and "deliberated" by his or herself. Since they had no trouble on the morning of November 17 agreeing without discussion on a detailed written set of factual findings and legal conclusions concerning each of the six women complaints,

4. *See* Ariz. Att'y. Gen. Op. I05-004 (2004)(the term "deliberations" [in Arizona's Open Meeting Statutes] "requires some collective action"; "Deliberations" and "discussions" "involve an exchange between members of the public body, which denotes more than unilateral activity.")

and sine the November 10 transcript stated that the board was going into executive session to begin deliberations, a reasonable jury (had it had the chance) could easily infer that illegal deliberation took place.

More to the point, a reasonable jury could next infer that deliberation was illegally done in private because the board members had something to hide. The trail testimony of board member Mary Carr and board president Bill Scheel shed light on why secrecy might have been desirable for the board. Mary Carr testified to the astonishing fact that "a lot" of her decision to terminate Lopez was based on what went on in the closed sessions during the hearing. But those hearings (see *supra)* did not concern whether or not the accusations of the six women were true, but rather primarily other accusations of sexual harassment (concerning *different* women) and the evaluation of Lopez following the 1994 Public Complaint (concerning which the superintendent opined that regardless of whether the accusations in the Public Complaint were true, his staff had those "perceptions" of Lopez and that was reason enough to terminate him). Carr being the board member moving for an affirmance of Lopez' dismissal, a reasonable jury could certainly infer just from her trial evidence that she gave great weight to allegations and the rumors and innuendo raised in those closed sessions that specifically did *not* concerning the six women complainants, and so were not part of the Statement of Charges which supposedly had given Lopez notice of all the charges against him.

Board President Bill Scheel supported this interpretation of events with his trial testimony. He testified that he was "leaning" towards termination and that he asked the county attorney to "prepare a document that would be legally

sufficient" to "uphold the termination." In other words it could quite well be inferred that the board decided first that Lopez needed to be terminated, based on everything they heard, including the evidence (and rumor and innuendo and rank hearsay relating to other supposed instances of misconduct) and asked the attorney assisting them to draft something that would cover them on the six charges. This would explain why the board was not concerned with deliberating specifically on the six individual charges, determining exactly what made happened in this case and whether each set of facts in fact constituted sexual harassment. Evidence that this is so, and that the board was basically unconcerned with the accuracy of their "findings and conclusions" is born out by the errors in the document itself. First of all the events with Beki Cooper are stated to have been "[d]uring the 1993 and 1994 school year", but Beki Cooper herself had stated that they occurred in 1992. Also regarding Beki Cooper the findings state that Lopez "engaged in unwelcome verbal *and physical* conduct of a sexual nature," but cite only to conduct involving only the use of words. *More significantly*, *none* of the sets of factual findings support the supposedly inferential legal conclusions of sexual harassment.[5]

But, given the Statement of Charges presented to Lopez in July, he was entitled to have the board consider the facts of each of the six sexual harassment allegations, decide which facts were true, and then determine whether those constituted

5. This issue was the subject of a partial summary judgment motion by Lopez in which the district court judge refused to rule on this issue raised by Lopez. However, the district court did rule, as to two of the women, that even if their full testimony at the hearing were to be believed as true, no reasonable person could conclude that they had been sexually harassed.

sexual harassment. That was all that was at issue at his hearing, because those were the only charges of which he had notice.

On this evidence judgment as a matter of law should not have been granted by the district court. A reasonable jury could easily have inferred from the trial evidence that Lopez was blind-sided by allegations against him of which he had no notice until the hearing itself and further "information" that the board had about Lopez by rumor, innuendo or hearsay which remained "secret" from Lopez. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). The court of appeals ignored this evidence and ignored binding precedent of this Court that a public employee being terminated from employment is entitled to full notice of the charges and evidence against him is reaching its summary decision.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 9, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-15172

D.C. No. CV-97-01059-RCB

CAMERINO M. LOPEZ, Jr.,

Plaintiff - Appellant,

v.

MARY K. CARR; et al.,

Defendants - Appellees.

Appeal from the United States District Court for the District of Arizona, Robert C. Broomfield, District Judge, Presiding

Argued and Submitted Oct. 19, 2005
San Francisco, California

Before: WALLACE, TROTT, and RYMER, Circuit Judges.

Appendix A

MEMORANDUM*

Lopez appeals from the district court's judgment, entered pursuant to Rule 50 motions, disposing of all of his claims. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm for the reasons stated by the district court.

Lopez has failed to establish a violation of his constitutional rights. In his eleven-day termination hearing, he was represented by counsel, testified at length, presented twenty witnesses, and cross-examined adverse witnesses. The hearing did not violate due process. *See Codd v. Velger,* 429 U.S. 624, 627, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977) (per curiam); *Mathews v. Eldridge,* 424 U.S. 319, 333-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). His allegations of bias and error in the proceedings do not rise to the level of a due process violation. *See Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482, 491-93, 496-97, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976); *Withrow v. Larkin,* 421 U.S. 35, 55, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

Additionally, Lopez's state law claim of intentional interference with contract was properly dismissed. *See Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors,* 184 Ariz. 419, 909 P.2d 486, 494-95 (1995).

AFFIRMED.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA FILED DECEMBER 24, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

No. CIV 97-1059 PHX RCB

CAMERINO LOPEZ,

Plaintiff,

vs.

MARY K. CARR, et al.,

Defendants.

ORDER

The court had intended to resolve all pending Rule 50 motions orally on the record but because of the number, extent and scope of those motions, and the number of parties, this written order will resolve them instead.

Plaintiff initially orally moved to renew his motion for summary judgment but later recast the motion as a Rule 50 motion. All defendants made separate Rule 50 motions, some oral and some written, some as they affect each individual defendant or groupings of defendants and some on behalf of all defendants. Some of the motions are well taken; others are not. Additionally, plaintiff and defendants have sought a judicial determination of certain issues. They are all rendered moot by this Order.

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A Rule 50 motion must be granted when, as here, there is such a serious failure of proof that no reasonable jury could find for those asserting affirmative claims. This is such a case at this stage. The court notes "at this stage" because, although there were stipulations that defendants' Rule 50 motions at the conclusion of plaintiff's case would be deferred until the close of all evidence so as not to unduly inconvenience the jury, those motions would have been deemed made at the appropriate time. The arguments took an entire day and would have further disrupted a trial which had been already excessively delayed and unexpectedly extended. However, for the reasons which will follow, it makes no difference whether the motions are considered based on the state of the evidence at the end of plaintiff's case, or, at the close of all the evidence.

It is important to note what is left in the case, both as to defendants and claims. Plaintiff has moved for, and the court has dismissed the lawsuit as to defendants Estate of Nedd, Zuroff and Gonzalez. Plaintiff also moved for, and the court has dismissed plaintiffs' Intentional Interference with Prospective Economic Advantage claims. The claims that remain are plaintiff's § 1983 property interest and liberty interest due process claims against all defendants and his Intentional Interference with Contract claim against defendants Sanchez and Robles.

Unless otherwise stated, the remaining defendants will be identified by the following group names: (1) the District - Phoenix Elementary School District, No. 1 and any "Official Capacity" defendants to the extent they have not already been dismissed; (2) the Administrative defendants - Williams,

Hannah, Gomez, Streetz and Mesa; (3) the School Board defendants - Scheel, Carr and Escarcega; (4) the Complainant Teacher defendants - Cooper, Robles, Teilborg, Sanchez, Killian and Luckey; (5) the PECTA "Plus" defendants - Armatage, de Ocampo and Tovar (PECTA representatives) and de Bermuda (the "Plus"); and (6) Ortega.

Some general observations. This trial consumed the better part of 17 days and 39 witnesses. As in most trials, credibility issues exist, some of which are serious and test the court's responsibility under Rule 50. For example, plaintiff would typically seemingly agree with much of what the Complainant Teacher defendants asserted occurred between each of them but when pressed on the more lurid details he would become evasive and finally, almost blurt out: Ok, then I'll deny it. Nonetheless, with one exception I will note, this court does not make any witness-by-witness credibility determinations based on a Rule 50 standard. The one exception, which has no effect on the ruling on these motions, or the trial itself, is the testimony of witness Carol Ann Ayala. In its third-three years as a trial judge, this court can recall no witness with less credibility. Her testimony was so halted, interrupted and disjointed - almost bizarre - that one wonders whether a transcript of it could even be prepared - the CD recording would better capture it. To the extent her testimony would bear on any issue in these motions - and the court does not believe it does - no reasonable jury could understand it, let alone accept it.

At the outset, the court concludes that, taking into account all the evidence offered by all parties (except that of Ms. Ayala), no reasonable jury could find any § 1983 violation

of due process by any defendant. Likewise, the same applies to the intentional interference with contract claim against defendants Sanchez and Robles; hence, all claims are dismissed as to all those defendants. However, because of the limitations on time which Rule 50 motions of necessity present, the court cannot make an exhaustive analysis of the evidence for sufficiency purposes as it relates to the number of defendants involved[1]. Further, independent of this case dispositive conclusion, the court reaches in much greater detail the other issues raised by the parties' Rule 50 motions, some of which are dispositive while others are not. While it is not possible from a temporal point of view to discuss every issue raised by every party, the following discussion covers the major issues. To the extent not otherwise covered in this Order, the court adopts the arguments of the parties making them.

Whether All Damages Flow From Termination

Mr. Terry Woods, on behalf of all defendants, moved the Court to rule as a matter of law that the only damages which could be assessed flow from plaintiff's termination. He argued that if plaintiff had not been terminated there would be no damages for any of the remaining causes of action. This is accurate. If plaintiff had not been terminated he would not have been able to maintain either his liberty or

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1. Based on the evidence, one wonders why Gomez, de Bermuda, Streetz and Mesa were made parties to this action as there is almost an abject lack of evidence tying them to plaintiff's claims. As it turns out, the evidence concerning the remaining defendants is, under all the circumstances, sparse.

property interest § 1983 due process claims or his state law claim for intentional interference with contract.

In order to prevail on his liberty interest due process claim plaintiff must prove "the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, *plus*, denial of some more tangible interest[] such as employment." *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (citing *Paul v. Davis*, 424 U.S. 693 (1976)).

Therefore, absent his termination plaintiff would not have a cause of action for a deprivation of his liberty interest. The alleged deprivation in plaintiff's property interest claim is that he was deprived of his property interest in his continuing employment with the District. If he had not been terminated he would not have been deprived of this interest and would have no such cause of action. Finally, a required element of Plaintiff's state law claim for intentional interference with contract is that Plaintiff suffered damages by termination of his employment. Without the termination plaintiff would not be able to meet this element and would have no state law claim for such interference. Therefore, the Court concludes that the termination is a key element of all of the remaining claims. The effect of this conclusion on each of the defendants depends on the causal link between their actions and the ultimate termination.

Causation

In *Taylor v. Brentwood Union Free School District*, 143 F.3d 679 (2nd Cir. 1998), the Second Circuit stated that the

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Supreme Court "consistently has refused to impose § 1983 liability upon defendants where the causal connection between their conduct and the constitutional injury is remote rather than direct." *Id.* at 686, citing, *Martinez v. California*, 444 U.S. 277, 285 (1980).

In *Taylor*, defendant-appellant Anne Rooney appealed a trial court's judgment against her, arguing, *inter alia*, that her actions were not the proximate cause of the plaintiff-appellee Taylor's injuries. There, Rooney, a school principal, received reports that an African American teacher in her school, Taylor, had used "excessive force" in disciplining two students. *Id.* at 681. As a result, Rooney informed district administrators of the report she received, and additionally, since the report involved Taylor's use of corporal punishment, requested that an assistant principal take photographs of the neck of one of the injured students. *Id.*

As a result of Rooney's report, district officials commenced an investigation of Taylor's conduct. *Id.* at 682. As a result of the investigation, the school district decided to bring charges against Taylor and commenced a disciplinary proceeding against him. *Id.* An extensive board hearing was conducted, which involved numerous live witnesses. *Id.* at 683-84. At the hearing's conclusion, the board voted in favor of a one year suspension of Taylor, without pay. *Id.* at 684. Taylor then lost an appeal of the school board's decision before the school commissioner. *Id.*

As a result of the foregoing, Taylor filed a complaint in federal court alleging that he had been singled out for disciplinary action because of his race. *Id.* Rooney, having

unsuccessfully brought a Rule 50(a) motion before the district court on the issue of causation, raised that argument before the Second Circuit. *Id.* at 686. Essentially, she argued that Taylor was not suspended based on her complaint alone; rather, the suspension required an investigation, decision of the board to bring charges and the decision of the board to suspend Taylor. *Id.* 1983 causation - not *Taylor.* In *Redman*, the Ninth Circuit, citing *Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978), stated that in § 1983 cases:

> The requisite causal connection can be established . . . by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Redman, 942 F.2d at 1447. The court agrees that *Redman* provides the proper standard on the issue of § 1983 causation.

The question that must be answered under *Redman* is whether the PECTA Defendants and the Complaining Teachers set in motion a series of acts which they either knew or should have known would result in the constitutional deprivation alleged by Plaintiff. Putting aside the question of whether a constitutional deprivation has been alleged, this court finds that no evidence has been presented from which a reasonable factfinder could conclude that the PECTA defendants or the Complainant Teacher defendants knew or should have known that a constitutional deprivation would occur. The fact that they set a series of events in motion by their acts does not resolve the issue. Plaintiff must prove that they set in motion the events which followed, either

knowing (or that they should have known) that a constitutional deprivation would occur. No evidence has been presented which would lead a reasonable jury to conclude that these Defendants had such knowledge, or should have possessed such knowledge[2].

Application to Specific § 1983 Claims

None of the PECTA Plus Defendants, Complainant-Teacher defendants, or other defendants unrelated to the Board Hearing, can be liable under § 1983 for damages related to the ultimate termination. This is so simply because the § 1983 claim cannot be established in the first place. Section 1983 requires the plaintiff to prove that the defendant caused the deprivation of his rights. *Monell v. Department of Social Servs.*, 436 U.S. 658, 692 (1978). As a result, with regard to the defendants who were not involved in the board hearings, the § 1983 claim simply cannot be established.

With regard to the liberty interest claim, plaintiff must show stigma - plus the loss of a tangible job benefit. While

2. The undisputed evidence reflects that the defendants' purpose was to resolve issues directly and only with plaintiff by the use of their letter of concern which was directed only to plaintiff. No action rising to the level of a constitutional deprivation was involved. Despite indicating that he would quickly respond to the letter, instead, plaintiff began to walk the school in any effort to identify those involved in the letter of concern. Though he later responded in writing, it was not responsive. Only then was the public complaint process employed and this was directed to the superintendent, not the school board. Again, there is no evidence that these defendants knew or should have known that any alleged constitutional violation would occur.

the non-Board related defendants may have caused stigma, they did not cause the termination, as discussed above.

With regard to the property interest claim, plaintiff must show the loss of his right to continued employment with the district for the remainder of his contract period. Again, there is no way for him to show cause with regard to the non-Board related defendants.

Qualified Immunity

Mr. Dick Woods argued and all Defendants have joined in the motion for judgment as a matter of law under the "qualified immunity" defense. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the United States Supreme Court held that the qualified immunity defense "shields [government agents] from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Id.* at 818; *see also, Behrens v. Pelletier*, 516 U.S. 299 (1996). The defense applies only to public officials sued in their individual capacities. *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1992). It is a determination for the court to make.

The court finds the reasoning of *Wood v. Strickland*, 420 U.S. 308, 321 (1975) to be particularly persuasive in framing the issue presented:

> We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that

> public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity.

The *Wood* Court emphasized that imposing section 1983 liability for the violation of constitutional rights would unfairly impose upon the school decision maker the "burden of mistakes made in good faith in the course of exercising his discretion within the scope of his official duties." *Id.* at 319.

Once the court determines that the Defendant is a decision maker, and that he has been sued in his individual capacity, it must next determine whether the defense applies. In *Harlow v. Fitzgerald*, the Supreme Court held that the applicable standard requires consideration of the "objective legal reasonableness" of the official's actions, as opposed to "good faith." 457 U.S. at 819. In further defining the defense, the Court in *Hallstrom v. City of Garden City* stated a two part test for determining whether the immunity applies. 991 F.2d at 1482. If the law was not clearly established, or if a reasonable officer could have believed the conduct was lawful, the official is entitled to qualified immunity. *Id.*; *Harlow*, 457 U.S. at 819.

At the December 17, 2003 oral argument, the parties disputed which Defendants are entitled to argue the defense of qualified immunity. As an initial matter, Plaintiff conceded that defendants Williams, Hannah, Gomez, and the School

Board were "decision makers" for purposes of this analysis. Even despite this concession, in light of the facts established at trial, the court agrees with this conclusion.

In addition to the PECTA Plus defendants raising this defense, the Complainant Teacher defendants, Williams, Hannah, Gomez and Ortega have argued that they are also entitled to avail themselves of the defense. This issue is close as to the PECTA defendants and the Complainant Teacher defendants, but since the court does not find that these defendants were decision makers, they cannot avail themselves of this defense. However, the defense does apply to Williams, Hannah, Gomez and the School Board defendants.

PECTA Plus Defendants and Complainant Teachers

As a threshold matter, the court is unable to reach the conclusion that the PECTA Plus defendants, as well as the Complainant Teacher defendants, can be considered "decision makers" in connection with the actions at issue in this litigation. These Defendants have not rebutted plaintiff's argument that their decision making responsibilities expanded beyond the classroom. While their brief would argue that these defendants' official responsibilities made them responsible to take the actions for which they have been sued, their brief concedes that these defendants were not decision makers in this case; nevertheless, it argues that qualified immunity should still apply to them.

The PECTA Plus Defendants assert that under *Shelton v. Tucker*, 364 U.S. 479, 485 (1960), the Supreme Court

recognized that "[a] teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern." *Id.* These defendants additionally contend that a school principal is also in a position to influence the children and young adults whom they supervise, and thus that they have a responsibility to provide sound leadership over the teachers and school staff.

The court does not find a connection between the Supreme Court's recognition of a teacher's vital role in the classroom, to the actions taken by the defendant teachers in this case with regard to plaintiff. In other words, while these Defendants have noted that teachers have an important role in relation to the students they teach, they appear to assert that those duties are affected, at least indirectly, by the teacher's relationship to the school principal. While compelling from a societal viewpoint, this extension of the Shelton notion is too tenuous to apply to the facts of this case.

While the court recognizes the important relationship between teachers and school principals and the effect that this relationship may have (indirectly) upon the students, no caselaw has been cited which would permit the court to find that this indirect relationship is grounds for a finding of qualified immunity where a teacher takes some action in relation to the school principal that the State has not required that teacher to take. In sum, the court finds that the PECTA Plus defendants and Complainant Teacher defendants were not decision makers, for qualified immunity purposes, for the actions they took in pursuing the sexual harassment complaints against Plaintiff.

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Williams

Williams, the school superintendent, was a decision maker with' regard to the § 1983 claims brought against her. Plaintiff alleges that Williams, as superintendent, hired Ortega to investigate the charges brought in the Public Complaint, and later presented them to the Board. Plaintiff also claims that Williams should have known of the contents of the plaintiff's personnel file which goes to his liberty interest claim under section 1983.

First, with regard to plaintiff's claim that Williams should have known the contents of his personnel file, the court notes that it would be impossible, in a district containing fourteen schools, for the superintendent to know the contents of any particular teacher's personnel file. As a result, the court finds that Williams simply had no responsibility in this regard.

Next, with regard to Williams' responsibilities in regard to hiring Ortega to investigate the charges brought in the public complaint, and later presenting them to the Board, qualified immunity applies. At this stage the need to investigate the allegations and the right to have a lawyer assist in that investigation seem clearly established and any reasonably objective superintendent would reasonably believe that doing so was lawful.

Hannah

Hannah acted as the Human Resources director for the district. She is alleged to have advised the PECTA defendants to use the Public Complaint process instead of the Grievance

Process. At that stage of the process it was her responsibility to both maintain the' District's personnel records and to give advice concerning how one would bring a complaint to district officials.

First, with regard to Hannah's responsibility to maintain the District's personnel records, the court finds no evidentiary basis for a conclusion that she did not properly fulfill this responsibility. Indeed, no evidence exists that Hannah was responsible for having removed any documents from plaintiff's personnel file, or that she placed the Findings, Conclusions and Order in the file. As a result, no conclusion can be reached that she failed to fulfill her responsibility with regard to plaintiff's file.

Second, with regard to Hannah's responsibility to give advice concerning how one would bring a complaint to District officials, the law governing her conduct was not clear. She did not interview any of Complainant Teacher defendants or even know of their specific complaints. The district had a grievance process as well as a public complaint process which permitted any member of the public including the Complainant Teacher defendants to file a complaint. This later process was only public in the sense that the public could use it: not that it was a process to be made public. Although plaintiff contends the public complaint eventually became publicly known and appeared in a newspaper, there is no evidence that any defendant in this action, and certainly not Hannah, caused such publication. It is just as reasonable to believe that plaintiff or one of his supporters, or even a person(s) independent of plaintiff or defendants caused its public disclosure. On the state of the evidence, no inference,

one way or the other, could be drawn; it would be rank speculation. Further, with such unclarity as to the correct process to be employed, Hannah, and any reasonable human resources director, could reasonably have believed that her conduct in simply providing advice as to which process should be used was lawful.

Gomez

There is no evidence that Gomez helped to undermine plaintiff or to turn the teachers' opinions against plaintiff after he returned from "the Prep" to what he contends was an unfavorable environment. The most that has been offered to show that Gomez must have been part of the effort to undermine plaintiff is that she "hung around" "some" of the Complainant Teacher defendants. The court already determined there is an insufficiency of evidence in this case and the paucity of it here exemplifies it. Since the court cannot divine the theory upon which plaintiff believes that Gomez violated plaintiff's due process rights, it is even more difficult to determine what conduct she allegedly undertook which was clearly established and whether a reasonable person in her circumstances would have believed that conduct was lawful. Gomez was the acting principal while the plaintiff was at the "Prep." The evidence does not reveal any act (law) which she had a right or duty to take which was clearly established or that a reasonable principal in her position would not have believed reasonably was lawful. She is entitled to immunity.

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The Board

Plaintiff concedes that the School Board members were decision makers with regard to the qualified immunity analysis. Plaintiff alleges that the Board violated his constitutional rights in the manner in which they heard and deliberated upon his case.

The Board argues that with regard to whether a reasonable officer could believe that its actions were lawful, the fact that they sought and received the advice of separate counsel demonstrates good faith compliance with the law and that a reasonable school board member in their position would have reasonably believed all that they did was lawful. The evidence reflects that the board never acted without the advice of counsel. The charges of the Complainant Teacher defendants were brought to them by the Superintendent and her lawyer (Ortega) who had investigated them and presented charges for them to adopt[3]; that they then hired their own

3. Plaintiff contends that the statute had changed from its former requirement that the board "adopt" charges to the board "presenting" them to the charged employee and that the use of the "adopting" process was defective. The difference is at most technical. The point is that plaintiff must get notice of the charges. He did, and his lawyer sat through the formal board meeting when the board took its action. Plaintiff truly stretches the evidence through his witness Gem Spurr who testified that plaintiff's attorney (Montoya) was not present at the July 12, 1994 board meeting when this action occurred but was present two weeks later on July 26 when she did see him at the later board meeting. On cross-examination she had to admit that she only met plaintiff's lawyer for the first time at the July 26 meeting. The court assumes that when plaintiff's current counsel called this witness at trial she was unaware of lack of knowledge.

lawyer (Wolcott) who advised them throughout all proceedings thereafter; that they held an eleven day hearing over a period of over two months which was transcribed for each member; were "voir dired" by their own lawyer on several occasions to insure that they could fairly and impartially hear and resolve the matter; that they each read and considered it and all the evidentiary documentation offered at the hearing over about one week's time; and each independently decided how they would vote. They did not discuss the case in executive session (they considered that that might have been unlawful) but took action in public session as Arizona law required.

Plaintiff is somehow critical of the board for not discussing the matter at the public meeting beyond taking the vote. Plaintiff cites no authority for this proposition that a school board collectively must "discuss" or deliberate in some fashion before its members vote on matters before it. No wonder; the court is aware of no such obligation. School Boards are not like juries which deliberate in private; they take public action as they did here in voting on specific findings and conclusions. The board members clearly acted in good faith and as reasonable board members would, believed their conduct was lawful, and plaintiff's meek suggestion of bias to the contrary are just that, meek. This board's conduct was about as pure as human frailties could make it. They are entitled to immunity[4].

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4. Plaintiff's factual thesis which he contends supports his claim of School Board bias is picayune at best. The Teresa Leone evidence is unrelated to any claim of sexual harassment. The Stella Favella incident is fleeting and minor. That Board member Escarcega might

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In addition, the Board argues that reliance on the advice of counsel can create "extraordinary circumstances," such that a court should grant them immunity regardless of whether a reasonable official would find their conduct unlawful. *V-1 Oil Co. v. Wyoming Dep't of Environmental Quality*, 902 F.2d 1482, 1488 (10th Cir. 1990). In the *V-1 Oil*, case, the Tenth Circuit held that "extraordinary circumstances" must be such that the defendant was so prevented from knowing that his actions were unconstitutional that he should not be imputed with knowledge of a clearly established right. *Id.* The circumstance most often considered for this treatment is reliance on the advice of counsel. *Id.*

Board attorney Dean Wolcott's advice to the Board was extensive and explicit. It was not disputed that this was his field of expertise for over 25 years and he was regarded as one of the most knowledgeable local lawyers in this field. This court further finds that his advice to the Board created "extraordinary circumstances," entitling the board members to immunity.

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have thought that to "adopt" charges meant that he was determining probable cause is not evidence of bias because there is no evidence of burden shifting at the ultimate eleven day hearing and, further, inasmuch as the Board could investigate and adjudicate the matter such a determination is not beyond the realm of reason. It further appears that he did not even understand the meaning of the term probable cause, but he clearly understood his responsibility at the ultimate hearing where sworn proof was offered. There is no direct evidence of bias of *any* board member and the foregoing does not alter it.

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Ortega

Ortega is also entitled to qualified immunity for the role he played in connection with Plaintiff's termination. It is undisputed that he was designated as the "compliance officer" for the District when he was hired by Williams to conduct the investigation. As such he was a state actor during the investigatory and prosecution stage of the proceedings before the Board. Everything he did comports with what a reasonable officer would do under the circumstances with the possible exception of the choice of verb he employed when developing the charges for the board's consideration after his investigation of the complaints raised by the Complainant Teacher defendants. The court has previously discussed this defect and it changes nothing in this analysis of Ortega's qualified immunity.

Plaintiff argues that Ortega conducted a defective investigation by not interviewing plaintiff. Ortega did try to interview plaintiff in the presence of his lawyer who refused to allow the interview to be recorded. Nonetheless, he considered plaintiff's written response by his lawyer to the charges. From a credibility viewpoint one wonders whether if the interview went forward without being recorded, plaintiff would have complained about the form and content of the interview. One can imagine that the criticism then would have been that the interview was not recorded and, thus defective. The reasonable lawyer would have done precisely what Ortega did. Ortega's role as compliance officer, investigator and prosecutor was clear. No reasonable compliance officer-lawyer would not have believed that his conduct was lawful.

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Absolute Immunity

Ortega also argues that, to the extent the court does not permit him to argue qualified immunity, he is entitled to absolute immunity for his role in investigating and prosecuting the disciplinary proceeding against plaintiff. Although the court has determined that Ortega is entitled to qualified immunity, it will briefly cover this additional theory.

Ortega cites many cases which render prosecutors immune from liability in connection with their actions in investigating and prosecuting cases. *See* Motion (December 17, 2003) at 10; citing, *Imbler v. Pachtman*, 424 U.S. 411, 421-31 (state criminal prosecutors absolutely immune from suit for their actions in state criminal proceedings); *Butz v. Economou*, 438 U.S. 478, 516-17 (1978) (federal agency attorneys absolutely immune from suit for their actions in agency hearings).

In *Mishler v. Clift*, 191 F.3d 998, 1002-03 (9th Cir. 1999), the Ninth Circuit noted that a functional approach is used to determine whether an official is entitled to absolute immunity; the court does not consider solely the status of the official. That court elaborated:

> Essentially, the court examines the function performed by the official and determines whether it is similar to a function that would have been entitled to absolute immunity when Congress enacted § 1983. [Citation omitted]. It is the "nature of the function performed, not the identity

> of the actor who performed it," that is critical to this inquiry.

Id., quoting Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1993).

In applying the foregoing standard, Ortega argues that the Ninth Circuit has held that officials, acting in administrative capacities similar to the school board hearing at issue in this case, have been held absolutely immune. In *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), the court held that a Deputy Attorney General was immune for alleged constitutional deprivations in connection with his prosecution of a complaint against the plaintiff with the California Board of Medical Quality Assurance. *Id.* at 1143-44. Likewise, in *Mischler, supra*, the Ninth Circuit held that quasi-judicial actions of the Nevada Board of Medical Examiners were protected by absolute immunity. 191 F.3d at 1001, 1007.

There can be little question but that, considering the functions performed by Ortega in connection with the investigation and prosecution of the Board action against Plaintiff, he should enjoy the benefits of absolute immunity. Indeed, the actions in which he is accused of having deprived Plaintiff of constitutional rights include the investigation of sexual harassment allegations, and the prosecution of a disciplinary action against him — clearly prosecutorial actions.

Nevertheless, the court additionally notes, as was recognized by Ortega at oral argument, that there is a waiver

issue that applies to this claim. Ortega's predecessor counsel did not include it as a defense in his answer or in the pre-trial order. The absolute immunity argument was presented for the first time in Ortega's Rule 50 motion — indeed, well over six years after the commencement of the present case. The court finds that this theory, therefore, has been waived by not having been argued previously in this action.

Noerr Pennington Doctrine

The Complainant Teacher defendants and the PECTA Plus defendants argued that the *Noerr-Pennington* doctrine prevents them from being held liable under § 1983. "Under the *Noerr-Pennington* doctrine, liability may not be assessed under § 1983 or the anti-trust laws, except in very limited circumstances, for actions taken when petitioning authorities to take official action, regardless of the motives of the petitioners, even where the petitioning activity has the intent or effect of depriving another of property interests." *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292, 298 (6th Cir. 1992). Although the *Noerr-Pennington* doctrine was developed by the Supreme Court in the context of the anti-trust laws, the Ninth Circuit has held that the right to petition the government for redress of grievances protects petitioners from § 1983 liability as well as anti-trust liability. *Evers v. County of Custer*, 745 F.2d 1196, 1199 (9th Cir. 1984). Statements made to the public in an effort to rally support to put pressure on authorities to take official action are protected by the First Amendment as well as statements made directly to governmental. *Eaton*, 975 F.2d at 299.

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In *Eaton*, the case most directly on point, the Sixth Circuit has ruled that a teacher's union and its local representative's efforts to get an elementary school principal fired were protected by their First Amendment right to petition the government. *Id.* The union representative, Gist, assisted a teacher who complained when the principal used a racial epithet to describe her. *Id.* at 294-95. Over the course of the subsequent proceedings Gist attended meetings with the teacher, insisted in front of the school board that the principal had violated school policy necessitating his termination, spoke at a public gathering urging the termination of the principal, and told the media that if the principal was not fired the union would assist the complaining teacher in filing suit against the school board. *Id.* at 295. The school board voted 3-2 in favor of terminating the principal. *Id.* at 295. The principal both appealed his termination to state court and filed suit in federal court alleging § 1983 claims against Gist, the union, the school board, the complaining teacher, and the superintendent. *Id.* at 295-96. The state appellate court overturned the termination and ordered that the principal be reinstated. *Id.* at 295. The board and superintendent settled in the federal case and a directed verdict was entered in favor of the teacher. *Id.* at 296. On appeal the Sixth Circuit ruled that all of the actions taken by Gist and the union were protected by the First Amendment. *Id.* at 299. The Sixth Circuit has also held that a citizen who complained to a school board about a teacher and sought to have him terminated was immunized from suit by her First Amendment rights. *Stachura v. Truszkowski*, 763 F.2d 211, 213 (6th Cir. 1985). Finally, the Seventh Circuit has opined in dicta that the extensive efforts of the president of a parent-teacher association to get a

principal fired were immune from liability under civil rights legislation. *Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988).

The Complainant Teacher defendants and the PECTA Plus defendants are similarly protected by the First Amendment. The Complainant Teacher defendants who made complaints about plaintiff and the PECTA defendants who assisted them in bringing their claims to the attention of the governmental officials responsible for making personnel decisions regarding plaintiff are protected by the First Amendment. They were all exercising their right to petition a governmental official (defendant Williams) and a governmental body (the School Board) to take official action to remedy their grievances concerning plaintiff. The *Noerr-Pennington* doctrine, as explicated by the *Eaton* case, clearly applies to this situation. Plaintiff's counsel has argued that this doctrine does not apply because the Public Complaint was not directed to a government official for the purpose of lobbying for plaintiff's termination. However, a copy of the Public Complaint was sent to defendant,Williams, who was plaintiff's supervisor and the individual responsible for initiating proceedings against him which could lead the authorities taking action to redress their grievances. Moreover, the evidence is that the people who participated in the Public Complaint did so with the distinct purpose of encouraging the school district to take some kind of action against plaintiff. Also, as discussed above, the protection of the *Noerr-Pennington* doctrine extends to statements made with the purpose of establishing public support for one's

position to lend more weight to the argument when it is put to the authorities. Therefore, the Complainant Teacher defendants and PECTA Plus defendants whose alleged depriving actions constituted requests to governmental authorities for action against plaintiff or statements to others asking for their support in the request for action against plaintiff are protected by the First Amendment. They are immune from liability under § 1983.

Intentional Interference With Contract

The only remaining state law claim is for intentional interference with contract against Defendants Robles and Sanchez. In order to prevail on this claim Plaintiff would have to prove five elements as to each Defendant: (1) Plaintiff had an employment relationship with the District, (2) Defendant knew of that employment relationship, (3) Defendant intentionally interfered with that relationship, causing the District to terminate the employment relationship, (4) Defendant's conduct was improper, and (5) Plaintiff suffered damages caused by the termination of the employment relationship. *Antwerp Diamond Exchange of America, Inc. v. Better Bus. Bureau of Maricopa County, Inc.*, 130 Ariz. 523, 529-30 (1981). The fact that the first element is met is undisputed. Defense counsel did not address the last element in briefing or at oral argument. However, Defendants contend that there is insufficient evidence for a reasonable jury to conclude that either the second, third, or fourth elements are met. No evidence was presented to establish that either Robles or Sanchez knew of the employment relationship that existed between Plaintiff and the District for the 1994-95 school year. Although both

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Defendants had worked at Garfield school in years prior to the 1994-95 school year, when they filed their sexual harassment complaints against Plaintiff neither was currently working at Garfield and there is no evidence that they were aware of plaintiff's contract with the school district for that year. There is also a complete lack of evidence that Robles or Sanchez intentionally interfered with Plaintiff's contractual relationship with the District. They certainly could not have intentionally interfered with a relationship they were not aware existed but even if it could be assumed that they were aware of it, there is also no evidence that they intentionally interfered with it. Finally, there is no evidence that Robles and Sanchez's complaints about Plaintiff were improper. The evidence was undisputed that the facts Robles and Sanchez set forth in their complaints occurred. Plaintiff only disputed the context of the reported events. Reporting events which actually occurred cannot be considered improper conduct. The complete lack of evidence on any one of these elements would be sufficient to merit judgment as a matter of law in favor of defendants Robles and Sanchez on the state law claim for intentional interference with contract. Since there is insufficient evidence for a reasonable jury to conclude that either the second, third, or fourth elements were met the Court will grant defendants Robles and Sanchez' motion for judgment as a matter of law on the remaining state law claim.

Parratt-Hudson Doctrine

The School Board defendants moved for judgment as a matter of law based on the Parratt-Hudson doctrine. Other defendants have joined.

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The cases from which the doctrine derives its name are inapposite; nevertheless, other circuits have applied the doctrine to cases with similar facts. Essentially, Defendants argue that the case applies to bar a § 1983 action in federal court based on a deprivation of due process where an adequate post-deprivation state law remedy is provided. More specifically, the doctrine provides that a "random, unauthorized deprivation of a property or liberty interest does not violate due process if the state furnishes an adequate post deprivation remedy." *Hartwick v. Board of Trustees of Johnson County Community College*, 782 F.Supp. 1507 (D. Kan. 1992), *citing Caine v. Hardy*, 942 F.2d 1406, 1412 (5th Cir. 1991).

It should be recalled that plaintiff has argued (in response to his motion to dismiss based on res judicata) that he did not have an adequate state law remedy since he was mentally insane when the state court hearing occurred. In addition, the court held that the res judicata argument was waived due to the prejudice of not having raised that affirmative defense earlier since he was not now prepared to put forth witnesses to demonstrate how the state court action was inadequate. In addition, this doctrine appears to be an affirmative defense (as it is highly analogous to res judicata); hence, the waiver issue may well apply to this doctrine as well. In their oral response, defendants have claimed, without citation to authority, that the doctrine is jurisdictional and, thus, not waivable.

In *Parratt v. Taylor*, 451 U.S. 527, 529 (1981), a prisoner brought a § 1983 lawsuit against state prison officials after they negligently lost his mail-order hobby kit. The prisoner

alleged that this action deprived him of his property without due process. *Id.* The Supreme Court, rejecting his claim, held that a predeprivation hearing is not always required. *Id.* at 540. The Court noted that predeprivation procedures were in place, but the guards failed to follow them. *Id.* at 541. The Court held that situations involving a loss of property resulting from "random and unauthorized acts of state officials in contravention of established state procedures cannot be predicted." *Id.* Hence, such negligent deprivations which occur without a prior hearing do not violate due process if a "meaningful post-deprivation remedy" is provided. *Id.*

In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), also cited by Defendants, the Court held that the *Parratt* rationale applies only where the injury is caused by a failure to follow established and adequate state procedures. It does not apply where the state procedures themselves destroy rights. *Id.* at 436. As such, it distinguished itself from *Parratt.*

In *Hudson v. Palmer*, 468 U.S. 517 (1981), the Court extended *Parratt* to cover random and unauthorized "intentional conduct" of state employees. *Id.* at 533. There, a prison guard, during a cell shakedown, intentionally destroyed some of the inmate's personal items. *Id.* at 520. The court found that this conduct fell within *Parratt. Id.* at 533.

In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Court modified the *Parratt-Hudson* doctrine to hold that a plaintiff generally need not exhaust his administrative remedies prior to commencing an action under § 1983. *Id.* at 124. However,

where the claim alleges a violation of procedural due process, a state remedy is relevant because the § 1983 claim does not accrue until the state deprives the plaintiff of that remedy. *Id.* at 125. In *Zinermon*, the court held that the deprivation alleged did not fall under the rubric of *Parratt-Hudson* due to the fact that the alleged deprivation at issue was not random and unauthorized (as had been the case in both *Parratt* and *Hudson*).[5] *Id.* at 136-38.

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5. Specifically, the court held that the liberty interest lost by petitioner (being involuntarily hospitalized) was not "unpredictable," as the state could determine the precise moment when such a deprivation would occur. *Id.* at 136. Petitioner alleged that he had signed voluntary admission forms for a mental hospital at a time when the hospital should have been aware that he was not competent to make a decision to voluntarily admit himself. He alleged that his due process was violated by the state allowing him to sign the admission forms. The court found that the violation of due process, thus, predictably would occur at the time the admission forms were given to the patient to sign.

Further, the court found that a predeprivation process was not impossible in this case (as it was in *Parratt* and *Hudson*). *Id.* at 137. Certainly, the State could have provided some mechanism to provide that petitioner was in fact voluntarily admitting himself to the hospital. *Id.*

Finally, the respondents' conduct was not "unauthorized" for *Parratt-Hudson* purposes. The state in fact delegated to respondents the power and authority to establish procedural safeguards to guard against unlawful confinement. *Id.* at 138. For the foregoing reasons, Parratt-Hudson did not apply where the deprivation was predictable at a fixed point in time (thus, not random), a process could have been provided to avert the deprivation, and the procedure by which to avert the deprivation was specifically authorized.

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In applying the foregoing rules after *Zinermon*, the court in *Hartwick v. Board of Trustees of Johnson County Community College*, 782 F.Supp. 1507 (D. Kan. 1992), engaged a three-part analysis of whether the State could implement predeprivation safeguards to address the risk of deprivation of the kind plaintiff alleges. *Id.* at 1513. Those factors include: (1) the extent to which the State can foresee the risk; (2) the degree to which it can reduce that risk through additional predeprivation process or by limiting the defendant's discretion in implementing already established procedures, and (3) the degree to which the defendants have the power and authority to implement the procedural safeguards required before the deprivation may occur. *Id.*

In *Hartwick*, the plaintiff, a tenured teacher whose contract was not renewed, argued that his rights were violated because the college board failed to follow state procedures at his nonrenewal hearing. *Id.* at 1513. Specifically, he alleged that the board (a) failed to notify him of the true reasons for his non-renewal, (b) by allowing a biased hearing panel to judge his case, (c) and by not having deliberation. *Id.* With regard to the first element of the *Parratt-Hudson* analysis, the court found that the state could no more predict that the hearing panel would disregard established procedures than it could that a prison guard would destroy an inmate's personal belongings. *Id.*

Hartwick cited *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991), in favor of its decision. *Id.* at 1513-14. There, an anesthesiologist brought a § 1983 claim against the doctors and hospital that suspended his privileges. *Id*. The plaintiff claimed that the defendants failed to give him proper notice

of the charges, and that the decision makers were biased against him. *Id.* at 1514. The court noted that the plaintiff did not challenge the adequacy of the procedures themselves, but rather the defendants' violations of the state procedures. *Id.* As a result, the court found that the allegations did not state a cause of action because of the *Parratt-Hudson* doctrine. *Id.*

As to the next issue, whether additional procedures would have prevented the constitutional deprivation, the *Hartwick* court noted that "it is difficult to imagine what additional predeprivation procedures could have been provided to prevent the Board from violating the statutory predeprivation procedures." *Id.* Hence, the second element was satisfied.

As to the third and final element, the *Hartwick* court noted that it had to determine whether the Board's conduct in allegedly violating the established state procedures was somehow "authorized." *Id.*, citing, *Zinermon*, 494 U.S. at 138. Under *Zinermon*, the Court held that some actions of officials to whom the authority to deprive property has been delegated amount to 'authorized' acts such that *Parratt*, is inapplicable (i.e. where a professional at a mental hospital is given authority to ensure that procedures for admitting incompetent patients are followed, that professional's authorization to disregard the procedure when admitting a patient who they feel is competent may make their disregarding of the procedures "authorized"). *Id.*

In *Hartwick*, the court held that the Board had no choice as to the type of procedures to follow. *Id.* If *Hartwick*

requested a hearing, the law mandated that he receive one. *Id.* In addition, *Hartwick* noted that the party requesting the hearing has the power to nominate one of the three officials who will hear the case (the college names one, the teacher names one, and those two name a third). *Id.* As a result, the *Hartwick* court held that it could not be stated that the Board had authority to disregard state procedures. *Id.* Having found that the foregoing three factors were not present in this case (as they were in *Zinermon*) that court held that *Parratt-Hudson* did apply to bar Hartwick's case since a state statute provided for a state court appeal of the Board's decision. *Id.*

It certainly appears that the cases cited by Defendants appear to apply under the present circumstances to bar the present case. The court, however, finds that the defense has been waived. At oral argument, plaintiff argued that the *Parratt-Hudson* defense was waived in the present case, as it was being raised for the first time at this late stage in the proceedings. In their oral reply to plaintiff's waiver argument, Defendants argued that the *Parratt-Hudson* issue is one of subject-matter jurisdiction, and is thus not subject to a waiver defense. No cases were cited to the court, however, in favor of this position.

After the oral argument, plaintiff chose to file a written response to Defendants' Rule 50 motions. Response (Dec. 19, 2003). In that response, he did not dispute the *Parratt-Hudson*, arguments asserted in defendants' motion. Of particular import, he did not cite any case which has determined the issue of whether the doctrine is one of subject-matter jurisdiction, or is more on the line of an affirmative defense (such that it could be waived). Furthermore, the court

has not been able to find any case which decides this issue. As a result of the fact that neither party has cited any case to the court that demonstrates that *Parratt-Hudson* is a subject-matter jurisdictional issue, the court is loathe to find that it does not have jurisdiction under the present circumstances.

It appears to this court that the doctrine creates an affirmative defense, similar to questions of res judicata or collateral estoppel, as it bars otherwise valid claims based on the presence of other opportunities to raise the argument. In finding that Defendants' res judicata argument was barred, this court found that argument to have been waived. Order (doc. 425) at 7-8. Essentially, since plaintiff argued that he did not have a fair opportunity to litigate his appeal of the Board's decision in state court, and since the lateness in raising the res judicata issue prejudiced Plaintiff's' ability to prove this defense at trial, the res judicata issue was waived. *Id.* The court notes a strong similarity between the res judicata issue and the present *Parratt-Hudson* issue. As a result, in light of the fact that no cases have been cited which render the *Parratt-Hudson* issue one of subject-matter jurisdiction, the court will consider that argument to be an affirmative defense which is subject to waiver.

District's Liability

As pointed out in the District's motion (doc. 448), it cannot be held liable on a vicarious basis for any violation of § 1983. As noted in the court's order (doc. 331, at 63), under *Monell v. New York City Dept of Soc. Svcs.*, 436 U.S. 658, 692-94 (1978), the District cannot be liable under § 1983 unless plaintiff proves (1) that his constitutional rights

were violated, and (2) the violation was caused by an official policy of the District, established by the District's policymakers. Order (doc. 331) at 63. The only policymakers, for purposes of § 1983 liability are the members of the School Board itself. *Id.* at 70. On the other hand, vicarious liability, under the theory of respondeat superior, may be assigned to the District based on plaintiff's state law claims.

As an initial matter, the District argues that the court should grant it judgment as a matter of law on plaintiff's § 1983 property interest claim — that he was entitled to have his future employment contracts free from interference. Motion (doc. 448) at 3. The District argues that since this claim is brought against the District vicariously for the actions of Williams - a Defendant this court has held was not a policymaker (as distinguished from a decision maker) — it fails as a matter of law. Motion (doc. 448) at 3. Since no evidence has been advanced that Williams' alleged interference with plaintiff's future contractual rights was a result of District policy, the District is entitled to judgment on this claim.

The District also seeks judgment on the grounds that plaintiff has not proven that he was ever denied later employment (i.e. with Willcox) due to the fact that Findings, Conclusions, and Order, were in his file. See Motion (doc. 448) at 4-5. In fact, the only evidence is that these findings did not preclude employment for plaintiff. Out of thirty applicants he rose to number three in consideration for the principalship, losing out to employment from within. The only evidence is that the findings did not adversely affect consideration for this job.

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Likewise, with regard to his § 1983 liberty interest claim against the District, Plaintiff claims that he was deprived of his liberty interest in reputation and good name because:

> (1) [T]he Findings, Conclusions and Order of the Board was placed in his personnel file; (2) future employment opportunities were lost by the publishing of the School Board's findings to prospective employers; (3) removing favorable evaluations from Plaintiff's personnel file; and (4) failing to publish favorable evaluations to prospective employers.

Motion (doc. 448) at 5. Defendants further note that this court has previously held that the allegations in (1) and (3) remain with respect to Williams and Hannah, and that (2) and (4) remained viable with respect to Williams alone. Further, the court held that all four remain viable with respect to the District. *Id.* Nevertheless, these claims remained viable as to the District only because the court relied on its holding that the District court be held vicariously liable on plaintiff's state law intentional interference with prospective economic advantage claims for the acts of Williams and Hannah. *Id.* at 5-6. These claims have now been dismissed.

As discussed previously, the District cannot be vicariously liable for Williams and Hannah's alleged violations of Plaintiff's' liberty interests under § 1983, even if it could have been liable for the state-law interference claim. As a result, the District is entitled to judgment as to plaintiff's liberty interest claim.

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The District seeks judgment independently on the ground that the issues alleged in (1) and (3) fail to implicate a federally protected liberty interest; and that the issues alleged in (2) and (4) have not been proven to have caused Plaintiff a loss of future employment opportunities. See Motion (doc. 448) at 5-9.

As to the one group that the court has held are policymakers (the School Board), the District argues that the Board hearings complied in all respects with the requirements of due process. Essentially, the District argues that the only rights plaintiff was entitled to under Due Process were the rights to be given timely and adequate notice of the reasons for his proposed termination, and a reasonable opportunity to defend by confronting any adverse witness and by presenting evidence and arguments of his own. *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970). The District is correct.

Plaintiff was given notice of the charges against him, indeed his lawyer Montoya was present when they were adopted; Plaintiff was given a right to, and did, request a full public hearing before the Board; he was represented by an able attorney, Montoya, both prior to and throughout the proceedings; Montoya vigorously and thoroughly cross-examined all of the witnesses called by Ortega; Montoya made numerous objections to witness's testimony, documentary evidence, items of procedure, etc.; Montoya made several motions and arguments on various matters throughout the course of the entire hearing; and Montoya called some 20 witnesses to testify on plaintiff's behalf. Plaintiff received more than the process he was due.

For all of the foregoing reasons, including the insufficiency of the evidence, and those arguments asserted by the parties who have prevailed on an issue in this Order, the action is dismissed as a matter of law.

IT IS ORDERED that the collective defendants' oral motion for judgment as a matter of law, pursuant to Rule 50(a), is GRANTED.

IT IS FURTHER ORDERED that defendant Phoenix Elementary School District's Motion for Judgment As a Matter of Law (doc. 448) is granted.

IT IS FURTHER ORDERED that the collective defendants' motion (oral and doc. 446 and 450) that they are entitled to qualified immunity is GRANTED IN PART and DENIED IN PART. It is GRANTED as to the School Board defendants, the Administrative defendants, and Ortega. It is DENIED as to the Complainant Teacher defendants and the PECTA Plus defendants.

IT IS FURTHER ORDERED that Ortega's motion for immunity is GRANTED IN PART AND DENIED IN PART (doc. 450). It is GRANTED as to qualified immunity. It is DENIED as to absolute immunity.

IT IS FURTHER ORDERED that the Complainant Teacher defendants' and the PECTA Plus defendants' motion for a determination that their actions were protected by the *Noerr-Pennington* doctrine (doc. 447) is GRANTED.

IT IS FURTHER ORDERED that the motion of defendants Robles and Sanchez for judgment as a matter of law on plaintiff's Intentional Interference with Contract (also doc. 447) is GRANTED.

IT IS FURTHER ORDERED that Defendants' motion for a judicial determination that the *Parratt-Hudson* doctrine (doc. 446) bars all of plaintiff's claims in this action is DENIED.

IT IS FINALLY ORDERED that defendants, and all of them, are granted judgment on plaintiff's claims in their entirety. The clerk is directed to enter judgment for defendants and terminate this action.

DATED this 24 day of December, 2003.

s/ Robert C. Broomfield
Robert C. Broomfield
Senior United States District Judge